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EXAMINER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/621,749
Filing Date: July 17, 2003
Appellant(s): GARDENIER ET AL.

John Pietrangelo
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5/22/08 appealing from the Office action mailed 9/19/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,754,989	LUDLOW	5-1998
5,715,546	KVALVIK	2-1998

4,575,882

DIAMOND

3-1986

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 65, 68, 70, 74, 77, 80, 87 and 92 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ludlow in view of Kvalvik.

Ludlow teaches a tub in Fig. 5, where the headrest 175 is positioned below the upper rim of the spa. Lacking in Ludlow is the teaching of a speaker positioned as claimed. Kvalvik teaches a tub T, having a headrest 30 with a speaker and speaker grille 38 therein. In light of this use of a speaker in a headrest, it would have been obvious to the ordinary artisan to employ a speaker in the Ludlow headrest. Such an employment would meet the phrase “below the upper rim” as the cushion in Ludlow is below the upper rim. As applicant argued previously, some form of means to “distribute” the sound would be inherent and such is the case here. This would include the now claimed speaker wire extending wherever needed or desired. This renders full response to claims 65,68,70 ,74,77, 80 and 92 as well as new claims 93-94, in that the Ludlow cushion would not “effect shipping” or “increase dimensions” with respect to extending above the spa upper surface, as seen in Fig. 5 of Ludlow. It is noted that the substance of claims 68, 70, 74,77,80,87 and 92 is not argued for separately.

Claims 66 and 69 are rejected under 35 U.S.C. 103(a) as being unpatentable over the art as applied to claim 65 above, and further in view of Diamond.

Diamond teaches the sound source placement of claim 66 in that the speaker 40 is seen to be fed by wires distal of the speaker. Also taught here, are a plurality of speakers 40, in Fig. 1a.

(10) Response to Argument

On page 10, second paragraph of the brief, it is argued that the “rim of substantially uniform elevation” and the head rest “mounted on or below the upper rim so as not to substantially alter the substantially uniform elevation” are not taught by the prior art. These parameters are clearly taught by Ludlow in Fig. 5, where the head rest 175 is seen to be mounted at or below the rim depicted at 170. It is also argued that the speaker “located below the upper rim of the housing” is not shown. The latter statement is true; however, the thrust of the 103 rejection is that it would have been obvious to the ordinary artisan to employ a speaker in the head rest of Ludlow as same is taught in an identical environment by Kvalvik. On pages 17-18 it is argued that “there is simply no room for audio equipment A of Kvalvik beneath the head rest of Ludlow”. The rejection does not rely on placement of “equipment” but merely a speaker, which is all that is being claimed in claim 65. Furthermore it is mere convenient speculation on the part of appellant, that the shape of the Ludlow head rest would have to be altered in order to accommodate a speaker. In fact, in view of miniature modern day electronics no alteration would be likely. Notwithstanding, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the

Art Unit: 3700

references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). It would have been axiomatic to the ordinary artisan that when introducing electronics into a water environment a shock hazard must be considered. As such if one chooses to introduce same below an achievable water level, steps must be taken to prevent shock and/or adverse effects.

On page 21, of the brief, it is argued that Diamond fails to teach a sound source “positioned within the housing and distal the at least one speaker”. The conventional sound sources are identified at lines 13-14 of the Abstract of Diamond and certainly as depicted in Fig. 2, the speaker wires of Diamond lead to some distal location for the sound source which due to the disclosure of lines 4-5 of the Abstract i.e. that the device is an “integral unit”, would include the sound source.

The arguments with respect to the propriety of the withdrawn claims 73, 84 and 85 will not be addressed as this is a petitionable issue, not an appealable one.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Charles E. Phillips/

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